

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VERNA K. BROWN

Claimant

VS.

**LAWRENCE-DOUGLAS COUNTY
BOARD OF HEALTH**

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

Docket No. 205,848

ORDER

Claimant requests review of the preliminary hearing Order entered in this proceeding by Administrative Law Judge Floyd V. Palmer on February 2, 1996.

ISSUES

The Administrative Law Judge denied claimant's request for temporary partial disability compensation finding "that K.S.A. 44-534a does not provide for a preliminary award of temporary partial compensation." Claimant alleges that the Administrative Law Judge exceeded his jurisdiction in finding that he did not have the authority to grant temporary partial disability benefits at a preliminary hearing.

Respondent raises an issue as to whether the Appeals Board has jurisdiction to review the preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

A preliminary finding concerning whether or not a claimant is entitled to temporary disability benefits is not one of the issues specifically listed in K.S.A. 44-534a as subject to review by the Appeals Board on an appeal from a preliminary order. However, an allegation that the Administrative Law Judge exceeded his jurisdiction may be reviewed pursuant to K.S.A. 1995 Supp. 44-551(b)(2)(A), which states in pertinent part:

“If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.”

Claimant contends that the Administrative Law Judge exceeded his jurisdiction in finding that he did not possess the authority to grant temporary partial disability compensation to a claimant at a preliminary hearing. The Appeals Board agrees.

Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. In this respect, temporary partial disability compensation is akin to temporary total disability compensation, as opposed to permanent partial disability compensation. This distinction is made evident by K.S.A. 44-510e(a) which provides in part:

“If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.” (Emphasis added.)

The calculation for temporary total disability compensation is, likewise, tied to the average gross weekly wage that the employee was earning prior to his injury. K.S.A. 44-510c(b)(1) provides:

“Where temporary total disability results from the injury [W]eekly payments shall be made during such temporary total disability, in a sum equal to 66 2/3% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto”

Further evidence that temporary partial disability is treated the same as, and is considered a form of, temporary total disability is contained within the provisions of K.S.A. 44-510e(a)(2). This provision provides for the calculation of the number of weeks payable for permanent partial disability compensation by subtracting from the 415 weeks the total number of weeks that temporary total disability compensation was paid. This provision has, likewise, been held applicable to temporary partial disability compensation. In other words, the equivalent weeks of temporary partial disability compensation are subtracted from the 415 weeks to find the total number of weeks available for an award of permanent partial general disability. See Richardson v. Wichita Arms, Inc., Docket No. 176,396, (Appeals Board Order dated August 19, 1994).

The Appeals Board finds that an administrative law judge has the authority to enter a preliminary order for the payment of temporary partial disability compensation. This matter should, therefore, be remanded to the Administrative Law Judge for reconsideration and a decision concerning claimant's request for temporary partial disability compensation consistent with the findings herein.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this proceeding should be, and hereby is, remanded to the Administrative Law Judge for further proceedings consistent with the findings and orders of the Appeals Board herein. The Appeals Board does not retain jurisdiction over this proceeding.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Dana D. Arth, Lenexa, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director